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No. 672

In the Supreme Court of the United States

OCTOBER TERM, 1957

HAROLD BRANNON MAGNESS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 80–85)[1] are reported at 26 T. C. 981. The opinion of the Court of Appeals (Pet. 12–18) is reported at 247 F. 2d 740.

JURISDICTION

The judgment of the Court of Appeals was entered on August 13, 1957. (Pet. 19.) Petitioner's motion for rehearing was denied on September 30, 1957. (Pet. 19.) The petition for a writ of certiorari was filed on December 16, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

[1] Record references are to the record in the court below.

QUESTION PRESENTED

Whether a subsistence allowance received by taxpayer, a state trooper, from the State of Georgia in the form of cash to defray the cost of his meals for every day of the year, regardless of whether he was on active duty, and whereby he could purchase his meals at any public restaurant of his choice, was additional compensation to him includible in his gross income under Section 22 (a) of the Internal Revenue Code of 1939.

STATUTES AND OTHER AUTHORITIES INVOLVED

The pertinent provisions of the applicable statutes and other authorities are set forth in the Appendix, *infra*, pp. 10–18.

STATEMENT

The relevant facts as found by the Tax Court (R. 81–82), and by the Court of Appeals (Pet. 12–13), may be summarized as follows:

During 1952, taxpayer was a highway patrolman with the Georgia Department of Public Safety. His station was in the City of Athens, Georgia, a distance of approximately twenty-five miles from his home. (R. 81.)

As a member of the State Patrol, taxpayer was required to live in a barracks in Athens and was subject to call twenty-four hours a day, every day in the year. He was entitled to a twenty-four hour pass one day each week, and to a two week vacation each year. When off duty he was required to advise his headquarters of his whereabouts at all times. (R. 81.)

In addition to his regular salary, taxpayer received in every pay check an amount denominated as subsistence. Such amount was paid to him at the rate of $4.50 per day for every day of the year regardless of whether or not he was on active duty. This amount of subsistence was paid to members of the State Patrol to defray the cost of their meals. Patrolmen, including taxpayer, purchased their meals at any public restaurant of their choice along the route of their patrol duty. They could eat at any time they chose while on duty but were required to notify their headquarters of their exact whereabouts. (R. 81–82.)

During 1952, taxpayer received a total of $1,647 for *per diem* subsistence, which he did not report as income. The Commissioner determined that such an amount constituted additional taxable compensation to him. (R. 82.) The Tax Court upheld the Commissioner's determination (R. 82–85), and the Court of Appeals affirmed (Pet. 12–18).

ARGUMENT

1. The decision below is correct. Taxpayer, who was single, received a financial benefit from the money paid to him for subsistence and for which he otherwise would have had to spend his own funds. These payments—made for every day of the year, whether taxpayer was on duty status, on leave, or on vacation—were paid in the same manner as his salary, and were intended to constitute remuneration for the services performed by him as a state trooper to the same extent as was his salary. As the court below noted (Pet. 16–17), when the Georgia Laws (1951) 635,

Section 1, were enacted to provide for subsistence to be paid in the form of cash as an addition to salaries and/or compensation, this provision was included in the Code of Georgia Annotated under Section 92A-209 (Appendix, *infra*, pp. 15–16), entitled, "Same; personnel; officers; salaries", and not under Section 92A-237 (Appendix, *infra*, p. 18), entitled, "Allowance for board and quarters". Accordingly, it is clear that these cash payments constitute "gains, profits, and income derived from salaries, wages, or compensation for personal service" within the broad definition of income contained in Section 22 (a) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 10). *Commissioner* v. *LoBue*, 351 U. S. 243, 246; *Commissioner* v. *Glenshaw Glass Co.*, 348 U. S. 426, 429–430; *Commissioner* v. *Smith*, 324 U. S. 177, 181.

Furthermore, the cash subsistence payments are not excludible from taxpayer's income. Although, as the court below pointed out (Pet. 15), Congress in Section 22 (b) of the 1939 Code (26 U. S. C. 1952 ed., Sec. 22) has listed some sixteen items which are excludible from tax, there is no provision which explicitly excludes amounts received for subsistence. Since the exclusions from income by Section 22 (b) are to be strictly construed, a taxpayer claiming the benefit of any particular exclusion must clearly come within the specific categories set forth by Congress. *Commissioner* v. *Jacobson*, 336 U. S. 28, 49; *Helvering* v. *Northwest Steel Mills*, 311 U. S. 46, 49. Instead, in the present case, it is clear that the cost of taxpayer's meals, which is similar to the costs incurred by most employed individuals who are required because

of the nature of their employment to eat at least one meal a day away from their residences in the vicinity of where they are employed, is a personal or living expense, the deductibility of which is expressly prohibited by Section 24 (a) (1) of the 1939 Code (Appendix, *infra*, p. 10).

2. There is no merit to taxpayer's contention (Pet. 7, 16) that the cash amounts paid to him are excludible from gross income under the so-called "convenience of the employer" rule, which excludes from income the value of living quarters and meals furnished in kind for the convenience of the employer. Section 39.22 (a)–3 of Treasury Regulations 118 (Appendix, *infra*, pp. 11–12). In the first place, as the Regulations and Mim. 6472, 1950–1 Cum. Bull. 15 (Appendix, *infra*, pp. 12–14) point out, if living quarters or meals furnished to a person constitute compensation for services rendered, the value of such living quarters or meals is taxable regardless of whether they were furnished for the convenience of the employer. In the present case, the subsistence amounts paid to taxpayer clearly constituted compensation to him. Second, Section 39.22 (a)–3 permits an exclusion only where the living quarters or meals are furnished to the employee in kind. In the present case, there is no dispute that taxpayer did not receive his meals in kind. (R. 26, 51.) Third, the decisions and rulings which have permitted certain taxpayers to exclude from their gross income living quarters or meals furnished in kind have done so upon the sole ground that such an employee could not otherwise perform the services required of him. Thus, if

the employee's duties were such that he could perform them without being required to eat his meals at the particular place selected by his employer, i. e., he could purchase his own meals, then the payment of cash subsistence or the furnishing of meals would also be for the convenience of the employee and not solely for the convenience of the employer, and would not be excludible from the employee's income. *Commissioner* v. *Moran*, 236 F. 2d 595 (C. A. 8th); *Commissioner* v. *Doak*, 234 F. 2d 704 (C. A. 4th); *United States* v. *Briggs*, 238 F. 2d 53 (C. A. 10th); *Van Rosen* v. *Commissioner*, 17 T. C. 834; *Hyslope* v. *Commissioner*, 21 T. C. 131; *Drill* v. *Commissioner*, 8 T. C. 902; *Osteen* v. *Commissioner*, 14 T. C. 1261; Mim. 6472, *supra*. See *Commissioner* v. *Flowers*, 326 U. S. 465, 473. Here, the cash payments were not made solely for the convenience of taxpayer's employer—these payments included all meals whether or not taxpayer was on duty, on leave, or on vacation. (R. 51.) Except when actually on patrol taxpayer could eat at any place he chose, and while on patrol the only limitation placed upon him was that he eat somewhere along his patrol route. (R. 30, 48, 50–51, 69.) This is not different from the situation of most employed persons.

Contrary to taxpayer's contention (Pet. 2, 7), and as the court below properly noted (Pet. 16–17), there is no conflict between the decision below and *Saunders* v. *Commissioner*, 215 F. 2d 768 (C. A. 3d). In the first place, in *Saunders* the Tax Court found (21 T. C. 630, 632), and the Court of Appeals relied upon (pp. 771, 773–774), the fact that the amount paid in lieu of rations was not regarded or accounted for as compen-

sation. On the other hand, in the present case not only was there no finding that the payments here involved were intended only as reimbursement for subsistence, but the record supports the conclusion that they were intended to constitute compensation. (See Pet. 16–17.) Second, in *Saunders* payment was made only for actual days on duty; and vacation and days on leave were specifically excluded, whereas in the present case payment was made in the same manner as salaries, regardless of whether taxpayer was on or off duty status. Third, in *Saunders* there were orders prescribing the time and place for eating meals, whereas no such orders appeared to have been issued in the present case.

3. Taxpayer's contention (Pet. 7–8, 9–11) that the cash payments for subsistence received by him are excludible from his income under the provision of Section 39.22 (a)–3 of Treasury Regulations 118, *supra*, relating to the value of quarters furnished to officers, warrant officers, and enlisted men in the armed services of the United States, or the Coast Guard, the Coast and Geodetic Survey and the Public Health Service, or amounts received as commutation of quarters, is erroneous. Although the decision of *Jones* v. *United States*, 60 C. Cls. 552, 566, is authority for the exclusion from gross income by military personnel of the United States of cash allowances made to them for subsistence and quarters,[2] this decision is limited

[2] As pointed out in *Jones*, *supra*, pp. 565–566, there had been a long-standing distinction between salary or compensation, and quarters or allowances for quarters furnished to certain persons in the service of the United States. In the face of this

to the specifically named groups and should not be extended to cover allowances made to civilian personnel. *Van Rosen* v. *Commissioner, supra,* pp. 839–840; *Hyslope* v. *Commissioner, supra,* p. 133; *Saunders* v. *Commissioner,* 21 T. C. 630, 634. Cf. *Saunders* v. *Commissioner,* 215 F. 2d 768 (C. A. 3d).

In the present case, neither quarters or commutation of quarters nor a person in one of the enumerated services of the United States is involved. Accordingly, there is no conflict between the decision below and *Jones* v. *United States, supra.*

4. The issue lacks substantial importance. By Section 119 of the Internal Revenue Code of 1954 (26 U. S. C. 1952 ed., Supp. IV, Sec. 119) Congress permitted the exclusion from gross income of the value of meals or lodging furnished an employee by his employer if such meals or lodging are furnished at the place of employment and if the employee is required to accept such meals or lodging at the place of employment as a condition of his employment. By Section 120 of the 1954 Code (26 U. S. C., 1952 ed., Supp. IV, Sec. 120) Congress authorized the exclusion of an amount not to exceed $5 per day received as statutory subsistence by a police officer of a state. It would appear that the 1954 Code provisions, and particu-

distinction, Congress in early income tax statutes levied the tax not only upon salaries but also upon payments to persons in the civil, military, or other employment or service of the United States. When Congress in later Revenue Acts omitted such payments from its description of what was subject to tax, this would indicate that Congress did not intend to have such payments included in gross income.

larly Section 120, would settle for the future the question raised in the present case.[3]

CONCLUSION

The decision below is correct and is not of general importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1958.

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[3] The court below properly held (Pet. 13–14, 15–16) that Sections 119 and 120 were not made retroactive to taxable years beginning before January 1, 1954, and that the legislative history of these provisions clearly reveals that Congress had intended these provisions to be new legislation and not to authorize such relief under the 1939 Code. See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 18, A38–A40; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 19–20, 190–191; H. Conf. Rep. No. 2543, 83d Cong., 2d Sess., pp. 26–27.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) [As amended by Section 1 of the Public Salary Tax Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including personal service as an officer or employee of a State, or any political subdivision thereof, or any agency or instrumentality of any one or more of the foregoing), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) [As amended by Section 127 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798] *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x);

* * * * *

(26 U. S. C. 1952 ed., Sec. 24.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

> Sec. 39.22(a)–1. *What included in gross income.* (a) Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. * * * In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *
>
> * * * * *
>
> Sec. 39.22(a)–3. *Compensation paid other than in cash.* If services are paid for with something other than money, the fair market value of the thing taken in payment is the amount to be included as income. If the services were rendered at a stipulated price, in the absence of evidence to the contrary such price will be presumed to be the fair value of the compensation received. If a corporation transfers to its employees its own stock as compensation for services rendered by the employee, the amount of such compensation to be included in the gross income of the employee is the fair market value of the stock at the time of the transfer. If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. The value of quarters furnished to the commissioned officers, chief warrant officers, warrant officers, and enlisted personnel of the Army, Navy, Air Force, Coast

Guard, Coast and Geodetic Survey, and Public Health Service, or amounts received by them as commutation of quarters, are to be excluded from gross income. See also section 22 (b) (6). Premiums paid by an employer on policies of group life insurance covering the lives of his employees, the beneficiaries of which are designated by the employees, are not income to the employees. See § 39.24(a)–3.

Mim. 6472, 1950–1 Cum. Bull. 15:

1. Section 22(a) of the Internal Revenue Code defines gross income as including "gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, * * *" Section 29.22 (a)–3 of Regulations 111, relating to compensation paid other than in cash, provides in part as follows:

> * * * If a person receives as compensation for services rendered a salary and in addition thereto living quarters or meals, the value to such person of the quarters and meals so furnished constitutes income subject to tax. If, however, living quarters or meals are furnished to employees for the convenience of the employer, the value thereof need not be computed and added to the compensation otherwise received by the employees. * * *

Similar language is contained in section 405.101 of Regulations 116, relating to wages subject to withholding of income tax at the source.

2. The first sentence of the above-quoted regulation adheres closely to the definition of gross income included in section 22(a) of the Internal Revenue Code and establishes the general rule that every person receiving living quarters or meals "as compensation for services rendered" must include in gross income the value to him of such quarters or meals. The second sentence

quoted above must be construed in the light of the first sentence to avoid being inconsistent therewith and to prevent violation of the statutory definition of gross income. The "convenience of the employer" rule is simply an administrative test to be applied only in cases in which the compensatory character of such benefits is not otherwise determinable. It follows that the rule should not be applied in any case in which it is evident from the other circumstances involved that the receipt of quarters or meals by the employee represents compensation for services rendered. This position is in accord with I.T. 2692 (C.B. XII–1, 28 (1933)) and the decision of the United States Board of Tax Appeals (now The Tax Court of the United States) in *Herman Martin* v. *Commissioner* (44 B.T.A. 185).

3. For example, a State civil service employee is employed at an institution in which the conditions of employment require him to live at the institution and be available for duty at any time. In connection with his employment, he is furnished living quarters and meals. Under the applicable State statute, the civil service rules and regulations of the State, or the individual contract of employment, the value of the living quarters and meals is considered as part of the employee's compensation. Regardless of whether living quarters and meals are furnished in addition to the cash salary, or the value thereof is deducted from the total salary established for the particular position, it is evident that the living quarters and meals are furnished as compensation for services rendered. Consequently, the value of the living quarters and meals is includible in his gross income and is subject to withholding of income tax at the source by the employer, notwithstanding the fact that the employee is required to live at the institution and be available for duty at any time.

4. Mimeograph 5023 (C. B. 1940–1, 14) and Mimeograph 5657 (C. B. 1944, 550) are hereby

modified to the extent they imply that the "convenience of the employer" rule is applicable to situations in which it is otherwise evident that living quarters or meals are furnished to an employee as compensation for services rendered. Similarly, O. D. 265 (C. B. 1, 71 (1919)), O. D. 814 (C. B. 4, 84 (1921)), O. D. 915 (C. B. 4, 85 (1921)), and I. T. 2253 (C. B. V–1. 32 (1926)) should not be relied upon as precedents in any case in which living quarters or meals are determined to be compensatory without reference to the "convenience of the employer" rule.

5. Under the authority contained in section 3791 (b) of the Internal Revenue Code, the provisions of this mimeograph will be applied without retroactive effect from January 1, 1949, in cases in which living quarters or meals are determined to be compensatory without reference to the "convenience of the employer" rule, except that any taxes which have been withheld or paid on the value of such living quarters or meals will not be refunded.

6. Correspondence relating to this mimeograph should refer to its number and the symbols IT:EIM.

GEO. J. SCHOENEMAN,
Commissioner.

Approved February 15, 1950.

THOMAS J. LYNCH,
Acting Secretary of the Treasury.

27 Code of Georgia Annotated and 1956 Supplement:

92A-201. *Creation.*—There is hereby created and established a division of the Department of Public Safety to be known as the Uniform Division, the members of which shall be known and designated as the Georgia State Patrol, and who shall wear a distinctive uniform and equipment to be prescribed by the Director of

Public Safety, and provided by the Department of Public Safety. (Acts 1937, pp. 322, 328; 1943, pp. 196, 201.)

92A-204. *Same; salaries.*—The salaries of the headquarters staff shall be on the same scale, and payable at such times as those of similar rank herein named. (Acts 1937, pp. 322, 328; 1943, pp. 196, 201; 1952, pp. 129, 130; 1955, pp. 298, 300; 1956, pp. 573, 574.)

92A-209. *Same; personnel; officers; salaries.*—One battalion of not more than 350 officers and men, in the discretion of the Director of Public Safety with the approval of the Department of Public Safety, which battalion as instituted, shall be composed of the following personnel, including the Commanding Officer and Treasurer herein named; said battalion to include not more than the following number of officers and non-commissioned officers with salaries as herein stated, payable monthly;

1 major	at $3,600	per year, each
5 captains	at $3,000	per year, each
8 1st lieutenants	at $2,600	per year, each
2 sergeant majors	at $2,500	per year, each
35 sergeants	at $2,400	per year, each
35 corporals	at $2,100	per year, each
All troopers	at $1,800	per year, each

Said salaries to be increased by the Director of Public Safety, with the approval of the Board of Public Safety, not more than five per cent. annually, for the first five years of enlistment; said five per cent. to be figured on base pay as set forth in this Act: Provided, however, the said salaries shall be maintained within the appropriation made by law. The provisions of this section granting an increase in salary of $25 per month, shall also apply to the members of the Georgia Bureau of Investigation.

Subsistence allowances shall be not less than $4 per day for troopers and officers. Said subsistence allowance is hereby made mandatory in the sum of not less than $4 per day and not

more than $5 per day, and shall be in addition to all salaries and/or compensation. (Acts 1937, pp. 322, 329; 1939, pp. 135, 136; 1943, pp. 196, 201; 1946, pp. 39, 40; 1947, pp. 1159, 1160; 1952, pp. 129, 131; 1955, pp. 298, 301; 1956, pp. 573, 575.)

92A-212. *Recruits.*—The Director of Public Safety is authorized to employ the number of recruits as may be necessary, who shall not be members of the Uniform Division, and the Director shall prescribe the rules and regulations governing the training and enlistment of such recruits, subject to the approval of the Board of Public Safety. (Acts 1949, pp. 70, 75; 1952, pp. 129, 132; 1955, pp. 298, 302; 1956, pp. 573, 576.)

92A-221. *Reappointment.* — All the officers and troopers, excepting the Director and Deputy Director of the Department of Public Safety, shall be enlisted to serve until retirement, subject to removal by the Director of Public Safety for cause after charges preferred and a hearing granted before the State Patrol Disciplinary Board, which Board shall be composed of the Director, the commanding officer, a captain, a lieutenant, a sergeant, a corporal, and a trooper. * * * (Acts 1949, pp. 70, 76.)

* * * * *

92A-224. *Enlistment; examination; training.*—It shall be the duty of the Director of the Department of Public Safety, subject to the laws of this State, to arrange for the enlistment and examination of applicants for service as troopers or officers of the Uniform Division of the Department of Public Safety, to provide the necessary preliminary training and subsequent instruction of troopers and recruits as peace officers of this State, and to make all necessary rules and regulations for the discipline, conduct and control of all officers, troopers and other employees of the Department of

Public Safety. (Acts 1937, pp. 322, 333; 1943, pp. 196, 201.)

92A-209. *Same; personnel; officers; salaries.*—The Director of the Department of Public Safety shall, within the limit of the appropriation, provide the members of the Uniform Division of the Department of Public Safety with proper uniforms, suitable to the season, and also with emergency and first aid outfits, weapons, horses, horse equipment, motor vehicles with radio equipment, if such be available, and all other necessary supplies and equipment for the purpose of carrying out the provisions of this Chapter, the same to remain the property of the State of Georgia. (Acts 1949, pp. 70, 77.)

92A-232. *Districts or divisions of the State.*—The Director of the Department of Public Safety with the approval of the Department of Public Safety, is authorized to divide the State of Georgia into districts or divisions, as may be necessary for the purpose of effectually patrolling the public roads and highways of this State and of the counties thereof, and for combating, detecting and preventing crime. (Acts 1937, pp. 322, 335; 1943, pp. 196, 201.)

92A-233. *Barracks; garages; stables; meals; cooks; allowance for expenses.*—The Director is authorized with approval of the Department of Public Safety to provide comfortable barracks and quarters for the officers and troopers of the Uniform Division of the Department of Public Safety at such districts or divisions. The Director of the Department of Public Safety shall also provide proper garages and storage places for all motor equipment and other equipment, for stabling of horses, and to provide for serving meals at such barracks or quarters and for the upkeep and maintenance of the same, to employ the necessary male cooks and servants, who need not be members of the Uniform Division, and whose compensation shall be fixed

in accordance with the rates prevailing at the place of employment, and who shall be subject to discharge at the pleasure of the commanding officer of the district or division. All members of the Uniform Division of the Department of Public Safety shall be paid a subsistence allowance of not less than $2.50 per diem, and when any officer or trooper is on duty away from his district or division he shall be allowed his proper expense for meals and lodging. (Acts 1937, pp. 322, 335; 1943, pp. 196, 201; 1946, pp. 39, 41.)

92A-237. *Allowance for board and quarters.*—The board and quarters herein provided shall be furnished to each and every member of the Uniform Division of the Department of Public Safety on active duty. Until adequate barracks or quarters with proper facilities for furnishing meals are secured for the headquarters staff, all officers and troopers shall be given a proper allowance for meals and lodging. (Acts 1937, pp. 322, 336; 1943, pp. 196, 201; 1945, pp. 117, 119.)

92A-239. *Duties of State Patrol.*—It shall be the primary duty of the Uniform Division of the Department of Public Safety to patrol the rural and public roads and highways throughout this State, to prevent, detect and investigate criminal acts, and to arrest and apprehend those charged with committing criminal offenses appertaining thereto, and to safeguard the lives and property of the public. (Acts 1937, pp. 322, 337.)

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